



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

AEG
Docket No: 1138-98
30 November 1999

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) 10 U.S.C. 1552

Encl: (1) Case Summary

1. Pursuant to the provisions of reference (a), Petitioner, a former midshipman at the United States Naval Academy, applied to this Board requesting that his naval record be corrected to show that he was not discharged from the Naval Academy but received his degree from the Academy and was commissioned an ensign in the Navy. Alternatively, he requests a correction to show that upon discharge, he was not required to reimburse the government for the cost of his education at the Academy.

2. The Board, consisting of Messrs. Zsalmán, Neuschafer and Zarnesky, reviewed Petitioner's allegations of error and injustice on 17 November 1999 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosure, midshipman records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application to the Board was filed in a timely manner.

c. Petitioner began his service at the Academy in the summer of 1992. In connection with his appointment, he signed an agreement to serve on active duty for six years after graduating from the Academy. The agreement also stated that in accordance with 10 U.S.C. § 2005, enlisted service could be directed if he failed to complete the course of instruction at the Academy. Petitioner also agreed that in accordance with § 2005, "should I . . . fail to complete the applicable period of active duty

incurred as the result of . . . disenrollment, I will reimburse the United States for the cost of the education received at the Naval Academy . . ." Sources at the Academy have advised that midshipmen also sign a second agreement at the beginning of their second class year in which they acknowledge that if disenrolled, recoupment of educational costs may be directed in lieu of enlisted service. However, attempts to locate Petitioner's agreement, which should have been signed in the summer of 1994, were unsuccessful.

d. It appears that during his first three years at the Academy, Petitioner's service was satisfactory. In this regard, at the time of his discharge, Petitioner stood 625th academically and 763rd overall in a class of 968.

e. Petitioner's first class year was marred on 23 October 1995 when the Brigade Honor Board found him guilty of lying during the preceding academic year. Documentation in the record indicates that Petitioner allegedly lied about his absence from a formation, and whether he received extra instruction during that absence. On 9 November 1995 the Commandant of Midshipmen, Captain (CAPT) B, conducted a hearing with Petitioner and, apparently at that time, upheld the finding of an honor violation.

f. On 3 December 1995 the Commandant concluded that Petitioner had committed the 5000 series offense of "failure to use good judgment with a major effect." Correspondence in the record sets forth as follows the circumstances surrounding this offense:

. . . (Petitioner) absented himself without authority and departed the Naval Academy to pick up former Midshipman (DiA) who had been arrested for an alleged DUI. After being arrested, Mr. (DiA) called (Petitioner) and asked the latter to come pick him up. It is noteworthy Midshipman (DiA) contacted (Petitioner) for assistance rather than contacting the chain of command and that (Petitioner) purposefully departed the Naval Academy without authorization and retrieved Midshipman (DiA) before reporting the incident to (Academy) authorities. (Petitioner) did, however, notify the chain of command of his actions upon return to the Academy.

This offense occurred on the Saturday night after the Army-Navy football game. Punishment for this offense included restriction to the Academy.

g. On 5 February 1996 the Commandant took final action on the honor violation he adjudicated at the hearing of 9 November 1995 and placed Petitioner on honor probation for four months, reduced his privileges and restricted him "to the Yard." In the letter advising Petitioner of such action, CAPT B stated that "this

honor violation may be considered in any proceeding or hearing to review your conduct . . . record . . . " Documentation in the file appears to indicate that the probationary period was retroactive to 9 November 1995 and, as such, expired in March 1996.

h. On 16 April 1996 the midshipman officer of the watch sent a memorandum to the Deputy Commandant stating that at approximately 0100 hours that morning, Petitioner and a Midshipman (MIDN) S had been arrested at the residence of a former Superintendent of the Maryland State Police, a Mr. Larry T. Both midshipmen were charged with breaking and entering and Petitioner was also charged with stealing a badge. The memorandum described the early morning events as follows:

Both midshipmen were present for taps at 2400 and left the Academy grounds sometime after taps was taken. They do not remember the exact time at which they left. Both midshipmen had been drinking.

MIDN (S) had previously dated Denise (T) (daughter of Larry [T]). The midshipmen tapped on Ms. (T's) window and she proceeded to let them enter the home. After socializing with Ms. (T), the midshipmen were asked to meet her on the porch. They exited the home and MIDN (S) proceeded to the porch where he was met by Ms. (T). (Petitioner) proceeded back to the car with Ms. (T's) badge on his person. A few minutes later, Mr. (T) arrived on the porch and the police were called.

The memorandum also noted that both midshipmen returned to the Academy about 0530 hours. Documentation in the file indicates that the civil charges were dismissed about a week later, but the incident received considerable attention in the local news media.

i. On 24 and 25 April 1996 Petitioner's military counsel submitted memoranda to CAPT B in anticipation of Petitioner's upcoming disciplinary action for the foregoing offense. In her initial memorandum, she noted that Petitioner had been charged with an intentional unauthorized absence (UA) of less than 24 hours, a 5000 series offense. She also noted that the civil charges had been dismissed. Counsel then argued as follows:

In light of the above, it is respectfully asserted that the offense itself was inappropriately charged . . . (A)t Section 2 Chapter 3 paragraph 3.0 (of COMDTMIDINST 5400.5A), it is stated that "[i]t is part of the philosophy of the Conduct System that an offense be handled at the lowest affective as well as effective level . . . " It is opined that in subject case, the lowest and most appropriate level for disposal of this matter would be the charging of a 4000 level offense, specifically, "UA--under

24 hours, over 30 minutes."

In her second memorandum, counsel briefly set forth the facts of the prior incident and opined that "while technically illegal, (Petitioner's) intentions were good as he put the needs of his shipmate above his own." Concerning the recent infraction, counsel requested that "the media attention related to this matter be disregarded," and stated that "while this offense is disturbing, when isolated from the media attention, it is not of the magnitude to require (Petitioner's) separation from the Naval Academy." She concluded by stating that although the two 5000 level offenses "cannot be overlooked" they did not warrant separation from the Academy.

j. The Commandant held a hearing in Petitioner's case on 26 April 1996. At the hearing, three individuals testified concerning Petitioner's good character, potential for further service, and his acceptance of responsibility for his actions. Other individuals, including several naval officers, also submitted written character references for the Commandant's consideration, including Petitioner's father. Petitioner also submitted a statement in which he expressed remorse and took responsibility for his actions, and requested an opportunity to prove his suitability for commissioning. However, Petitioner's midshipman chain of command noted his propensity for misconduct and recommended his separation from the Academy. This recommendation was echoed by the company enlisted advisor, and the company and battalion officers. The Commandant also questioned Petitioner on the recent infraction, and recorded his reply as follows:

. . . (Petitioner) stated that on the evening of 16 April 1996, he and Midshipman (S) were at Midshipman (S's) sponsor's house talking and drinking a large amount of alcohol while on authorized liberty . . . After a few hours, (Petitioner) drove he and Midshipman (S) back to the Naval Academy for taps. A short time later, the two departed the Naval Academy, while still intoxicated from their earlier activities, and drove to the house of Midshipman (S's) former girlfriend, Ms. (T), near the football stadium. Sometime after arriving at Ms. (T's) house, Midshipman (S) and (Petitioner) were arrested by Annapolis City Police. (Petitioner) acknowledged that he had driven while under the influence of alcohol, was aware of the prohibition against driving while under the influence of alcohol, and stated he felt he was fortunate that no one was killed as a result of his misconduct/poor judgement.

On 21 May 1996 CAPT B submitted a memorandum to the Superintendent of the Naval Academy, Admiral (ADM) L, in which he found Petitioner unsatisfactory in conduct by reason of his two

5000 level offenses in consecutive semesters, and recommended him for discharge from the Academy. The memorandum also noted that the civil charges arising out of Petitioner's most recent infraction had been dismissed, and stated that those charges "were not considered for purposes of the adjudication of the intentional UA charge" In support of the recommendation for separation the Commandant stated, in part:

. . . I found it particularly noteworthy that (Petitioner's) most recent conduct violation came one month following completion of the term of his Honor Probation and less than two days following my address to the Brigade of Midshipmen admonishing them that all midshipmen should closely examine their personal behavior and performance, and that misconduct would not be tolerated.

k. Documentation in the file reflects that although the Superintendent was not required to meet with Petitioner, he did so at about 1330 hours on 28 May 1996. Immediately after this meeting, Petitioner was advised that ADM L would recommend his discharge from the Naval Academy. At about 1600 hours that same day, ADM L met with Mr. and Mrs. T.

l. By memorandum of 29 May 1996 the Superintendent concurred with the recommendation for discharge and notified Petitioner of his right to submit a written Show Cause Statement to the Secretary of the Navy (SECNAV) concerning the proposed discharge action. Petitioner submitted such a statement on 10 June 1996 in which he said that he had made mistakes and tried to learn from them. He also said that "I have personally apologized to the (T) family, and recognized that through a cavalier attitude, I put myself into a position where the media burned both myself and the Academy relentlessly, even though the initial accusations were inappropriate and inexcusably false." Petitioner also stated how much becoming a Naval officer meant to him, and requested a late graduation and commissioning in the Navy.

m. On 27 June 1996 Petitioner submitted a "Statement of Understanding" to the Commandant in which he acknowledged, in part, as follows:

. . . If (SECNAV) determines that the midshipman's conduct renders him or her unsuitable for service, (SECNAV) may require the midshipman to reimburse the government for the cost of education received at the Naval Academy. Under (§ 2005), if the midshipman disputes that such a debt is owed, (SECNAV) shall designate a member of the armed forces or civilian under his jurisdiction to determine the validity of the debt . . .

On that same date, Petitioner submitted to SECNAV a letter entitled "Acknowledgment of Options Pertaining to Separation from

the United States Naval Academy." In that letter, Petitioner stated that he had been advised, in part, of the following:

Should (SECNAV) determine that I am unsuitable for service or that it is in the best interest of the service to waive the active duty service obligation, I may be required to reimburse the government for the cost of my education at the Naval Academy in the amount of \$87,000.

Should SECNAV determine that I am unsuitable for service or that it is in the best interest of the service to waive my active duty obligation, I may petition for a waiver of the reimbursable amount.

In accordance with the foregoing advice, Petitioner requested a waiver of both the three-year enlisted active duty obligation and the requirement to reimburse the government for the cost of his education.

n. On 11 July 1996 the Superintendent submitted Petitioner's case to SECNAV and adhered to his earlier recommendation for discharge. In this regard, the Superintendent stated as follows:

After careful review of the entire record in this case, including (Petitioner's) Show Cause Statement, I continue to concur with the Commandant's recommendation for separation. In short, (Petitioner) has been provided ample opportunity during the past year to demonstrate, through his actions rather than his words, his commitment to the U.S. Navy. A review of the circumstances associated with his performance since May 1995 clearly reflects (Petitioner's) inability to comport himself to the high standards expected of naval officers. In fact, (Petitioner's) record reflects an inability to meet even the most basic standards of performance demanded of midshipmen and naval officers.

The Superintendent also recommended that Petitioner not be required to fulfill his enlisted active service obligation, but that he reimburse the government for the cost of his education in the amount of approximately \$87,200.

o. On 12 July 1996 Petitioner submitted a Hotline Complaint to the Department of Defense Inspector General (DODIG) contending, in part, that he was a victim of discrimination based on gender, alleging that more favorable treatment had been accorded to a similarly situated female midshipman, MIDN 1/C DB. Petitioner also alleged that ADM L had acted improperly in meeting with Mr. and Mrs. T and discussing his case with them. Petitioner's allegation of disparate treatment at this time is perplexing since ADM L, on 12 July 1996, told MIDN DB that he would recommend her discharge from the Academy. That recommendation was made pursuant to action of the Brigade Honor Board, which

found her guilty of lying. Additionally, in September 1995, she had been placed on conduct probation because she committed two 5000 level offenses of underage drinking in one semester.

p. DODIG delegated responsibility for investigating Petitioner's complaint to the Naval Inspector General (NIG), who submitted his report on 28 August 1996 and concluded that Petitioner's complaints were without merit. The NIG's report also stated as follows concerning the scheduling of the meetings ADM L had with Petitioner and Mr. and Mrs. T:

During both of his tours as Superintendent, it has been ADM (L's) policy not to meet with anyone but the Midshipman himself when considering disposition of a case, and even then, only if the Midshipman desires such a meeting. Otherwise, he decides cases based on the objective content of the case file without any other input. He has never met with family members, attorneys or any other supporters or detractors prior to or during the course of deciding a Midshipman's case. Any input those parties may have is submitted to him in writing. The Commandant holds a full hearing which allows for personal input from all sources, and ADM (L) sees no need to repeat that.

Within several weeks of the incident, Mrs. (T) called ADM (L's) office and asked to speak with him personally. She would not disclose the subject she wished to address. When the Flag Writer asked if she would like to speak with the Flag Secretary or the Aide, Mrs. (T) insisted that she only wanted to speak with ADM (L). She was then advised that the Admiral's office would get back to her. The issue was brought to the attention of CAPT (Sa), the Executive Assistant. CAPT (Sa) returned Mrs. (T's) call, but again, Mrs. (T) only wanted to speak with ADM (L) and would not disclose the issue she wanted to address with him to anyone else. In calls back and forth over a week, Mrs. (T) eventually conceded that she wanted to discuss the incident that occurred at her home in which (Petitioner) was arrested. She told CAPT (Sa) that she believed it was important for ADM (L) to hear their input, and she was taken aback when CAPT (Sa) told her "we don't do that." He explained that ADM (L) needed to be able to judge (Petitioner's) case on the facts and that her input was not relevant to his decision. Mrs. (T) became upset and told CAPT (Sa) that she was not going to go away and still wanted to see ADM (L). CAPT (Sa) subsequently briefed ADM (L) several days later and they agreed that ADM (L) should not meet with the (T's) until he had decided on (Petitioner's) case.

ADM (L) had a call placed to Mrs. (T) which was returned by Mr. (T). ADM (L) told Mr. (T) that he could not meet with

him for about 10 days or so and that he would not discuss (Petitioner's) case either on the phone or in person. Mr. (T) declined to state the express purpose for wanting to meet with ADM (L) but hinted that he and his wife were angry over their perceived mistreatment by the Navy in the aftermath of the incident at their home. ADM (L) told his staff to go ahead and schedule the meeting, with the proviso that (Petitioner's) case would have to be resolved first, or the (T's) would have to be rescheduled. The meeting was set for 1600, . . . 28 May 1996.

. . . (Petitioner) subsequently indicated that he wanted to meet with ADM (L) prior to his rendering of a decision in the case. With graduation on the 24th of May followed by a holiday weekend, both CAPT (Sa) . . . and CAPT (Sc), the Superintendent's Legal Advisor, pressed to ensure that (ADM (L) had the opportunity to meet with (Petitioner) and decide his case before meeting with the (T's) at 1600 on the 28th of May . . . CAPT (Sa) gave ADM (L) (Petitioner's) case file to read over the weekend . . .

. . . All parties agree that (Petitioner) was standing by (on 28 May) from 1000 on, but recollections of the actual time of the meeting vary. The Admiral and CAPT (Sc) believed that the meeting occurred by noon. (Petitioner) recalled that he waited in CAPT (Sc's) office until about 1230, and then was secured briefly for chow, returning by 1300, and then met with ADM (L) at about 1330.

. . . The Admiral had read the case file over the weekend and had decided that unless (Petitioner) presented new information, he was going to recommend separation. The meeting was brief, lasting only about 5 minutes. When (Petitioner) was dismissed, CAPT (Sc) told him to stand by outside his office downstairs. As soon as (Petitioner) had departed, ADM (L) noted to CAPTs (Sa) and (Sc) that (Petitioner) had not raised any new issues and that his decision was to recommend separation. Although ADM (L's) normal policy is to delay informing Midshipmen of his decisions for at least twenty-four hours, in this case, he wanted to ensure that (Petitioner) knew of his decision before he met with the (T's) at 1600. Accordingly, he signed the formal letter of notification that had been prepared and was in the case file package and he told CAPT (Sc) to let (Petitioner) know the outcome "right now." CAPT (Sc) immediately returned to his office, where (Petitioner) was standing by, and informed him of ADM (L's) decision to recommend separation. (Petitioner) was disappointed that it had only taken ADM (L) "15 minutes to decide his case."

q. The report went on to detail the specifics of ADM L's

meeting with Mr. and Mrs. T. All versions of this meeting agree that ADM L told Mr. and Mrs. T that he had put off meeting with them until after he had decided Petitioner's case, and declined to discuss the case with them. However, it appears that he did tell them that he had recommended Petitioner's discharge from the Academy. According to CAPT Sa, the T's were extremely critical of ADM L in that no one at the Academy had contacted them after the incident and in effect lectured the Superintendent in an insulting manner. They derided his leadership and his apparent lack of knowledge as to the proper way to treat 'townspeople.' The report summed up the feelings of Mr. and Mrs. T as follows:

The (T's) did speak about the incident at their home and the way they were treated by the Navy. However, they did not argue for stern disciplinary action against (Petitioner) or for his separation. They were not there to talk about (Petitioner), they were there to complain about the way they were treated by the Navy. Mr. (T) stated that the meeting lasted an hour or so and that he and his wife got absolutely no satisfaction from ADM (L) and were more stressed after the meeting than when it began.

r. Meanwhile, the recommendation for Petitioner's discharge from the Academy was concurred in by the Chief of Naval Personnel and Chief of Naval Operations (CNO) on 24 and 30 July 1996, respectively. On 3 October 1996 the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN/M&RA) approved those recommendations. On 4 October 1996 Petitioner's defense counsel submitted a letter to SECNAV requesting reevaluation of the Superintendent's recommendation for discharge. In her letter, counsel once again went over the facts of Petitioner's case and stated as follows concerning the second infraction:

. . . The press coverage of this alleged breaking and entering case was nation-wide and admittedly, came at a bad time for the United States Naval Academy and Navy. (Petitioner) was charged with the 5000 level offense, unauthorized absence for "jumping the wall" prior to the wrongful arrest, then separated for unsatisfactory conduct. It is again respectfully submitted that the UA charged was overly severe as a more appropriate charge existed, specifically the 4000 level offense of UA under 24 hours, over 30 minutes.

Petitioner's mother also wrote a letter to CNO concerning her son's case. In that letter, she alleged that the discharge process was tainted by "media pressure and how it affected the Academy." She also contended that Mr. T had spoken with the Superintendent about the case while Petitioner's father, a decorated Naval officer, was denied that privilege. Petitioner apparently was not notified until 7 January 1997 of the decision to discharge him from the Naval Academy, and he was discharged

that same day.

s. On 24 January 1997 SECNAV concluded that MIDN DB had not committed an honor violation, disapproved the recommendation that she be discharged from the Academy and directed that she be commissioned an ensign in the Navy.

t. A letter of 2 July 1997 from an Academy official stated that Petitioner had attended the Academy from the summer of 1992 until the spring of 1996 and completed all academic requirements for a degree, but did not graduate "because he failed to meet other nonacademic requirements."

u. Petitioner submitted his application to the Board in February 1998. In a brief accompanying the application, Petitioner's counsel alleges that the decision to discharge his client from the Academy was both erroneous and unjust. Along these lines, counsel contends that although both of Petitioner's infractions were charged as 5000 series offenses, they should have been charged as 4000 series offenses since the applicable regulation states that infractions should be disposed of at the lowest appropriate level. Counsel further avers that even if the charging decisions were appropriate, the decision to discharge Petitioner, though technically proper, was inconsistent with the usual practice at the Academy. In support of this proposition, counsel names three former midshipmen and alleges that they had similar records but were permitted to graduate and be commissioned since their cases did not result in the adverse media attention generated by Petitioner's case. Counsel also alleges that his client's case was "impermissibly infected with the media attention resulting from the serial misconduct crises that plagued the (Academy) in the Spring of 1996." In support of this proposition, counsel has submitted a statement from an officer who was present at the conduct hearing of 26 April 1996, and states that CAPT B admitted to her that given the unfavorable media attention, a decision to let Petitioner graduate would have been "too difficult to defend." Counsel also alleges that pressure from Mr. and Mrs. T was a factor in the decision to discharge his client. Additionally, counsel states that Petitioner's discharge was unfair given the fact that neither his mother nor father were permitted to appear before ADM L, but Mr. and Mrs. T did so. Finally, counsel points out that Petitioner does not have the financial means to reimburse the government as directed.

v. In a supplemental letter of 29 June 1998, counsel points out that a former varsity football quarterback at the Academy was permitted to graduate and was commissioned despite committing offenses which involved sexual misconduct with a female fourth class midshipman. In another letter of 1 December 1998, counsel points out that monetary recoupment was waived in the case of a midshipman discharged from the Academy for using LSD after

political pressure was brought to bear on senior civilian officials. Counsel further contends that in accordance with § 2005(g)(1), Petitioner has contested the validity of the debt he owes for his educational expenses, and he was never properly advised, in accordance with § 2005(g)(2), of the requirement to reimburse the government for the cost of his education.

w. The Staff Judge Advocate (SJA) to the Superintendent has submitted an advisory opinion dated 24 September 1999 which addresses the foregoing contentions of error. The SJA initially opines that Petitioner was appropriately charged with 5000 series offenses for his two instances of misconduct. Concerning the incident after the Army-Navy game, the SJA states that this offense was aggravated since Petitioner failed to inform the chain of command prior to leaving the Academy to pick up MIDN DiA. Further, his status as a midshipman was under review at that time due to the prior Honor offense. Concerning the incident of 16 April 1996, the SJA initially notes that the 4000 series offense for unauthorized absence apparently was designed to punish absences that were not intentional but due to negligence or carelessness. Petitioner's absence, on the other hand, was deliberate and occurred after taps muster. The SJA states that the offense was further aggravated because Petitioner was restricted to the Academy due to Honor probation at that time, and also mentions that Petitioner was intoxicated at the time of the offense. Concerning the contention of disparate treatment, the SJA states that due to the destruction of relevant records, it is difficult to reconstruct any sort of sample for disciplinary cases during the time period at issue. After providing such a sample for the past 18 months, the SJA states that Petitioner's discharge was appropriate given his status as a first class midshipman, prior conduct and honor record, and failure to heed the Commandant's address to the midshipmen admonishing them to be on their best behavior. The SJA addresses the issue of compliance with § 2005(g) by noting that the statute apparently intended that an individual receive a warning immediately before pursuing a course of action that might result in an indebtedness. However, the SJA points out that Petitioner signed the agreement upon entering the Academy, and apparently executed another statement of understanding when he began his second class year. The SJA goes on to opine that a failure to warn should not invalidate the debt unless it "materially prejudiced or harmed the complainant in that he pursued a course of action he might not otherwise have pursued had he been appropriately warned" The SJA concludes that Petitioner was made aware of the reimbursement obligation, and was not prejudiced by the failure to timely advise since he "was not called upon to make elections or to consider any possible courses of actions or options that would have benefitted from a prior advisement. . . ."

x. Both Petitioner and counsel responded to the advisory

opinion by letters of 25 and 28 October 1999, respectively. In his letter, Petitioner provides his version of events concerning the two infractions which led to his discharge from the Academy. Especially noteworthy is Petitioner's contention that after the Army-Navy game, none of his superiors were available for notification before he left the Academy to pick up MIDN DiA. However, Petitioner states that he did notify a subordinate prior to leaving. Concerning the second incident, Petitioner contends that he was not on restriction because he had completed his Honor probation. Further, he states that he had only one beer and one mixed drink on that evening, and was not intoxicated at any time. Petitioner alleges that at the Commandant's hearing, he admitted to drinking but the amount was blown "completely out of proportion." The contention that the Commandant overstated Petitioner's indulgence on that evening is corroborated, to a considerable extent, by one of the statements submitted with Petitioner's application. In his letter to the Board, alleges that when Petitioner entered the Academy, he was only advised that reimbursement could be directed if he refused to serve in an enlisted status or failed to do so because of misconduct.

y. § 2005(g)(1) states that if an individual fails to fulfill an agreement entered into under that section, may owe a debt to the United States and contests the debt, an official will be directed to investigate the case, hear evidence, and submit a report to the service secretary. § 2005(g)(2) states that any servicemember subject to a reimbursement requirement must be advised of the requirement before requesting voluntary separation or deciding on a course of action regarding an administrative action resulting from alleged misconduct.

z. In April 1994, about three years prior to Petitioner's discharge, SECNAV directed that 24 members of the class of 1994 be discharged from the Academy. These midshipmen were involved in a cheating scandal in which they received illicit advance copies of the Fall 1992 Electrical Engineering (EE) examination. Additionally, many of them lied about their misconduct during the ensuing investigations. However, because of the length of time it took to complete the investigations and discharge processing, SECNAV waived the requirement that these individuals either serve in an enlisted status or reimburse the government. Senior Navy officials cautioned, however, that waiver "should not be looked at as something that will happen again in the future." John Fairhall, *Final Decision Made: 24 Mids to be Expelled*, Baltimore Sun, Apr. 29, 1994, at 1B, 9B.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial relief. Specifically, the Board believes that Petitioner should

not be required to reimburse the government for the cost of his education at the Academy.

The Board initially concludes that the action to discharge Petitioner from the Academy was neither erroneous nor unjust. Specifically, the Board rejects the contention that it was improper and unjust to charge both of Petitioner's infractions as 5000 series offenses and not in the less serious 4000 series. The Board notes the admonition in Academy regulations to the effect that an offense should be charged at the lowest possible level, but believes that the charging decision is one in which Academy officials are vested with considerable discretion, and that such a decision should be overturned only for a clear abuse of that discretion. After carefully considering the facts and circumstances of the two incidents at issue, the Board can find no such abuse of discretion.

Concerning the first incident, it is clear that Petitioner left the Academy grounds without authority on the night after the 1995 Army-Navy game in order to pick up MIDN DiA, who had been apprehended by civil authorities for DUI. Certainly, Petitioner's instinct was correct--a midshipman was in trouble and he should help him. However, it is also clear that Petitioner was in a restricted status, and was not supposed to leave the Academy grounds unless specifically authorized to do so. Notwithstanding Petitioner's contention that no one in his chain of command was available to give him that permission, the Board finds it difficult to believe there was no one superior to Petitioner on the Academy grounds that night who could have provided the necessary authorization. Further, although most midshipmen apparently were celebrating after the game, surely there was another midshipman who could have gone in Petitioner's place. Finally, the Board cannot ignore the fact that Petitioner was a first class midshipman who had just been found guilty of an honor offense, and Academy officials may have believed they had to "get his attention." In sum, the Board believes that although this infraction could have been appropriately charged as a 4000 series offense, it was not inappropriate to charge it more severely.

The Board also believes that it was appropriate to charge the 16 April 1996 incident as a 5000 series offense. The Board is aware that this particular incident generated considerable publicity, some of which was inaccurate. Looking at entire record, the Board is uncertain as to the role alcohol played in the infraction, although it is clear that Petitioner drank and then drove, never a wise course of action. Contrary to the contention in the advisory opinion, it appears that he was not on Honor probation at the time of the offense. This is buttressed by the Commandant's memorandum of 21 May 1996 which refers to the expiration of that probationary period. Nevertheless, Petitioner's unauthorized absence led to an embarrassing incident

in the civilian community only two days after the Commandant publicly emphasized the necessity to stay out of trouble because of recent adverse media attention. Additionally, his absence on this occasion clearly was deliberate. Accordingly, the Board concludes that the decision to charge this infraction as a 5000 was proper and appropriate.

The Board declines to conclude that the action to discharge Petitioner was inappropriate given the action taken in the cases of other midshipmen who may have been similarly situated. Along these lines, the Board notes that Petitioner provides no evidence to support his contention that these individuals had similar records, although it appears that MIDN DB did have some disciplinary problems prior to the alleged honor violation that was later found unsubstantiated. Further, the Board notes that Petitioner's overall record at the Academy, while satisfactory, was relatively undistinguished. The other individuals may have been retained due to better academic and performance records.

The Board further concludes that the decision to discharge Petitioner from the Academy was not tainted by any undue influence exerted by Mr. and Mrs. T. The NIG's report makes it clear that officials at the Academy, including but not limited to ADM L, were sensitive to their concerns and gave them an opportunity to meet with ADM L and voice their frustrations. However, ADM L and his subordinates also took care to keep the T's separate and apart from the discharge proceedings against Petitioner. The T's were not even permitted to voice their concerns in a substantive manner until after the decision had been made to discharge him. According to the NIG report, neither of the T's ever pressed for Petitioner's discharge from the Academy or any other stern disciplinary measure.

Turning to the issue of monetary reimbursement, the Board rejects the contention that Petitioner had no knowledge of the requirement to reimburse the government for educational expenses. The service agreement he signed in connection with his appointment as a midshipman specifically stated that reimbursement could be directed if he failed to complete the six-year period of active duty due to disenrollment from the Academy. Although there is no definitive proof, there is no reason to believe that Petitioner was not advised of this requirement when he began his second class year, as this is a routine and well established practice.

Counsel contends and the SJA, in the advisory opinion, appears to assume that there was noncompliance with the procedural requirements of § 2005. However, it very much appears to the Board that the Academy substantially complied with these provisions. § 2005(g)(1) requires that an investigator be appointed if an individual contests a debt that may be owed under the statute. Petitioner acknowledged on 27 June 1996 that he was

aware of this provision, but declined to contest the validity of the debt, choosing only to request a waiver of the reimbursement requirement. § 2005(g)(2) states that before an individual decides on a course of action regarding an administrative action resulting from allegations of misconduct, the person must be advised of the requirement to reimburse the government. Petitioner was advised on 27 June 1996 of both the requirement to reimburse and the amount that might be due. Although it appears that this advice might more appropriately have been given prior to 10 June 1996, when Petitioner submitted his Show Cause Statement, the timing of the advice certainly did not prejudice him since in that statement, he asked for retention at the Academy. Further, the advice was given in time for him to request a waiver of the reimbursement requirement. Accordingly, even if there was noncompliance with § 2005(g)(2), the Board concurs with the SJA that such failure did not prejudice Petitioner and provides no basis for corrective action.

Despite its belief that the decision to direct reimbursement was legally unobjectionable, the Board believes that decision is unduly harsh and should now be reversed. Although Petitioner was discharged for misconduct, his conduct record at the Academy was virtually spotless until the two incidents at issue. Further, even though the Board believes that Petitioner did commit misconduct as alleged, it also finds a substantial amount of extenuation and mitigation in both incidents. Concerning the infraction after the Army-Navy game, the Board believes that although he did not handle it properly, his motives were pure; his heart was in the right place. Further, it is very clear that Petitioner made no attempt to conceal his actions and, in fact, put himself on report. Additionally, the Board cannot help but note that if MIDN DiA had not used extremely bad judgment in driving under the influence of alcohol, Petitioner would not have committed this infraction. Moving to the incident of 16 April 1996, the Board finds that Petitioner certainly used extremely poor judgment on this occasion. However, this incident apparently was blown out of proportion in the local media, and surely this adverse publicity significantly affected the outcome of Petitioner's case.

More importantly, the Board takes the position that Petitioner was treated unfairly when compared to the midshipmen discharged in 1994 for cheating on the EE examination and the individual discharged in 1998 for drug use. Concerning the cheaters, the Board notes that their misconduct was aggravated due to the premeditation involved in using illicitly obtained copies of an examination, and because at least some of them lied about their actions. Such misconduct strikes at the heart of the honor system since these midshipmen were involved in lying, cheating and stealing. The Board is also aware that the reimbursement requirement was waived for them because of the length of time it took to complete the investigation and not because the misconduct

did not warrant such action. However, the Board concludes that although this rationale may explain the disparate treatment, it cannot justify that treatment. Likewise, the Board is aware that political considerations may have caused the decision to waive reimbursement in the case of the individual discharged due to LSD use. Such misconduct is a blatant violation of the Navy's "zero tolerance" policy on drug abuse, and routinely results in discharge under other than honorable conditions for officers and enlisted personnel. Accordingly, the Board does not believe that political considerations justified an exception to policy in that case. Finally, the Board took into account the decision to graduate and commission the former quarterback after the finding that he committed offenses involving sexual misconduct and fraternization. In sum, the Board cannot justify recoupment in Petitioner's case given the favorable treatment in these other cases which involved misconduct that arguably was more serious than his.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that on 3 October 1996 ASN/M&RA) directed his discharge from the Academy, but waived the requirement that he reimburse the government for the cost of his education at the Academy.

b. That no further relief be granted.

c. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

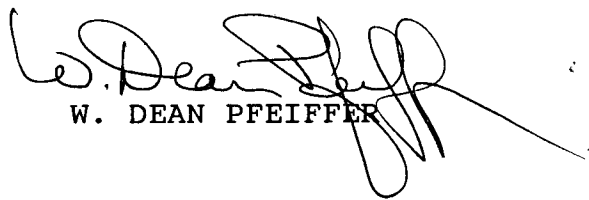
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



ALAN E. GOLDSMITH
Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.



W. DEAN PFEIFFER

Reviewed and approved:



THE ASSISTANT SECRETARY OF THE NAVY
(MANPOWER AND RESERVE AFFAIRS)
1000 NAVY PENTAGON
WASHINGTON, D.C. 20350-1000

29 June 2000

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

I have considered the recommendation of the Board for Correction of Naval Records (BCNR) that Petitioner's record be corrected to waive the requirement that he reimburse the Government for the cost of his education at the U.S. Naval Academy. For the reasons stated below, the recommendation is disapproved and relief is denied.

In making its recommendation to grant relief, BCNR concluded that it would be unfair to recoup educational expenses in light of prior Secretarial actions waiving recoupment in the 1994 EE 311 cheating scandal cases and a 1998 case involving drug abuse.

The fact that the Department of the Navy waived recoupment in certain other Naval Academy cases is not dispositive. The Department has consistently applied a policy of recouping educational expenses when a midshipman leaves the Academy voluntarily or as a result of misconduct and of waiving recoupment only in exceptional circumstances. Petitioner's case was decided in a manner consistent with that policy and it was a proper exercise of discretion to conclude that a waiver of recoupment was not warranted. Accordingly, I find no error or injustice warranting relief.

Carolyn H. Becraft

CAROLYN H. BECRAFT
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)